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No. 93-116

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In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM FALOON AND SAUL KENT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Commissioner of the Food and Drug Administration should not be required to testify in district court with regard to petitioners' claims of selective prosecution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 985 F.2d 510. The orders of the district court and the magistrate judge are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1993. A petition for rehearing was denied on April 15, 1993. Pet. App. 13. The petition for a writ of certiorari was filed on July 13, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This petition arises out of a criminal prosecution brought against petitioners for violations of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.* The Food and Drug Administration (FDA) began an investigation of petitioners in 1986 and referred the case to the Justice Department in 1988. On November 5, 1991, a federal grand jury in Ft. Lauderdale, Florida, returned a 28-count indictment charging petitioners with, *inter alia*, causing unapproved new drugs and misbranded prescription drugs to be introduced into interstate commerce with intent to defraud and mislead, and unlawfully attempting to import prescription drugs through the use of false statements. Pet. App. 2; Gov't C.A. Br. 1-2.

In March 1992, petitioners filed a motion to dismiss the indictment, alleging selective prosecution by the government. Petitioners claimed that the FDA had impermissibly exercised its enforcement discretion in determining when it would proceed against importers of unlawful unapproved drugs. Specifically, petitioners alleged that the FDA has not brought enforcement actions against so-called "AIDS Buyers Clubs," which import AIDS-related drugs for the personal use of AIDS victims. Pet. 3-4; Pet. App. 2; Gov't C.A. Br. 2.

In connection with their motion, petitioners subpoenaed Dr. David Kessler, Commissioner of Food and Drugs, in July 1992. The government filed a motion to quash the subpoena, arguing that Commissioner Kessler had had no involvement with the agency's decisionmaking process in referring petitioners' case to the Justice Department. Indeed, Commissioner Kessler did not assume his duties at

the FDA until December 1990, more than two years after the case had been referred to the Justice Department for prosecution and more than four years after the investigation into petitioners' activities had been initiated. Pet. 5; Pet. App. 11; Gov't C.A. Br. 2-3.

The issue of Commissioner Kessler's testimony was not immediately resolved, because the government made available other FDA officials to testify about the agency's enforcement policy. Those officials included Daniel L. Michels, the former Director of the FDA's Office of Drug Compliance, who testified regarding the FDA's enforcement practices, and Dr. Randolph Wykoff, Director of the FDA's Office of AIDS Coordination, who testified concerning the FDA's policies regarding AIDS Buyers' Clubs. After those witnesses had testified, however, petitioners again sought the Commissioner's testimony concerning the FDA's enforcement policy and subpoenaed him to testify on February 9, 1993. Pet. 5-6; Pet. App. 10; Gov't C.A. Br. 3-4.

2. On February 2, 1993, the magistrate judge denied the government's motion to quash the subpoena of Commissioner Kessler and ordered the Commissioner to present testimony for 30 minutes by telephone. The district court rejected the government's appeal. Pet. 6; Pet. App. 2-3.

3. The court of appeals granted the government's petition for a writ of mandamus and ordered the district court to quash the subpoena of Commissioner Kessler. Pet. App. 1-12. Recognizing the general policy disfavoring compelled testimony of high government officials absent extraordinary circumstances (*id.* at 7-10), the court found that no such circumstances existed in this case. The court ex-

plained that the FDA had provided other witnesses regarding its enforcement policy and that Dr. Kessler did not assume office until over two years after the case had been sent to the Justice Department for prosecution, and thus he "could not have been responsible for selectively prosecuting [petitioners]." *Id.* at 10-11.[1]

ARGUMENT

1. This Court has long held that, absent unusual circumstances, courts should refrain from probing the thought processes of agency decisionmakers. *United States* v. *Morgan*, 313 U.S. 409, 422 (1941). Accordingly, the courts of appeals have consistently recognized that agency heads "should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." *In re Office of Inspector General*, 933 F.2d 276, 278 (5th Cir. 1991) (quoting *Simplex Time Recorder Co.* v. *Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985)). Accord *Peoples* v. *United States Dep't of Agriculture*, 427 F.2d 561, 567 (D.C. Cir. 1970) ("subjecting a cabinet officer to oral deposition is not normally countenanced"); *United States Board of Parole* v. *Merhige*, 487 F.2d 25 (4th Cir. 1973) (Parole Board members could not be deposed absent exceptional circumstances), cert. denied, 417 U.S. 918 (1974); *Warren Bank* v. *Camp*, 396 F.2d 52, 56-57 (6th Cir. 1968) (Comptroller of the Currency could not be

[1] The court of appeals also held that the district court's order compelling the testimony of Commissioner Kessler was reviewable by way of petition for writ of mandamus. Pet. App. 3-7. Petitioners do not seek review of that holding. See Pet. 10 n.3.

deposed absent showing of misconduct); *United States* v. *Winner*, 641 F.2d 825, 834 (10th Cir. 1981) (order compelling testimony of Assistant Attorney General "must be supported by detailed written findings").

The reasons for that rule are self-evident. Agency heads are charged with sweeping statutory responsibilities in furtherance of the public interest. At the same time, their agencies are generally involved in litigation in courts across the Nation. That is particularly true for an agency such as the FDA, which is charged with important and wide-ranging duties, including both civil and criminal law enforcement.[2] If agency heads could routinely be subpoenaed to appear in agency enforcement proceedings, their ability to execute their statutory duties would be significantly impaired, and the public interest would suffer as a result.

The court of appeals correctly recognized (Pet. App. 10-11) that no compelling circumstances require Commissioner Kessler's testimony in this case. To establish a claim of selective prosecution, a defendant must show both impermissible motive and discriminatory effect. *Wayte* v. *United States*, 470 U.S. 598, 608 (1985). The courts of appeals have consistently held that defendants seeking to prove selective prosecution must demonstrate that (a) similarly situated persons who have committed the same acts have not been prosecuted and (b) their own prosecution resulted from impermissible motivations. See, *e.g.*, *United States* v. *Gutierrez*, 990 F.2d 472, 475 (9th Cir. 1993); *Owen* v. *Wainwright*, 806 F.2d 1519, 1523 (11th Cir. 1986), cert. denied, 481 U.S. 1071 (1987).

[2] The FDA informs us that it brings more than 200 civil and criminal enforcement proceedings each year.

As the court of appeals noted (Pet. App. 11), Commissioner Kessler joined the FDA only after this case had been referred to the Justice Department for prosecution, and thus he is in no position to provide first-hand testimony concerning the agency's motivations in initiating the prosecution. At most, the Commissioner could testify only in general terms about current FDA policy on the importation of AIDS-related drugs. There is no conceivable justification for requiring such a report from the head of the agency, particularly where, as here, petitioners have already obtained the testimony of other FDA officials on the only issues that Commissioner Kessler could address.

2. Petitioners contend (Pet. 8-11) that the court of appeals erred in quashing their subpoena based on a legal standard that applies only in civil cases. According to petitioners, they were entitled to Dr. Kessler's testimony under the allegedly more lenient standards applicable to criminal discovery.

Contrary to petitioners' contention, the courts have not established a different rule for determining when the testimony of high-ranking government officials will be compelled at the behest of a criminal defendant. Rather, the same rule applies in both criminal and civil cases—that high-ranking officials should not be required to testify absent particularized findings of need. See, *e.g.*, *United States* v. *Winner*, 641 F.2d at 834. Petitioner cites no authority to the contrary.[3]

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[3] The cases on which petitioners rely (Pet. 9) are inapposite, because none of them involves a subpoena for the testimony of a high-ranking government official.

Petitioners' contention also ignores established case law holding that discovery with regard to claims of selective prosecution is permitted only when a defendant first produces evidence tending to show both discriminatory impact and improper motivation. As the Second Circuit held in the leading case of *United States* v. *Berrios*, 501 F.2d 1207, 1211-1212 (1974), the courts will "first require some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." See also *United States* v. *Heidecke*, 900 F.2d 1155, 1159 (7th Cir. 1990); *United States* v. *Penagaricano-Soler*, 911 F.2d 833, 837 (1st Cir. 1990); *United States* v. *Peete*, 919 F.2d 1168, 1176 (6th Cir. 1990); *United States* v. *Murdock*, 548 F.2d 599, 600 (5th Cir. 1977). After obtaining extensive discovery and the testimony of several FDA officials, petitioners cannot show evidence tending to establish the elements of their selective prosecution claim, much less evidence that would require testimony from Commissioner Kessler. Accordingly, petitioners' claims do not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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